(1) Supreme Court

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No. _____

In the Supreme Court of the United States

CHRISTOPHER G. HARRISON,
Petitioner,

v.

HON. JOSEPH R. KAINRAD, JUDGE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal habeas corpus petition attacking the constitutional merit of a state court criminal conviction constitutes a 28 U.S.C. § 2244(b) "second or successive habeas corpus application" where petitioner had earlier sought such relief only for release on bail pending direct appeal of that conviction.

PARTIES TO THE PROCEEDING

Petitioner

Christopher G. Harrison is an individual and has no corporate affiliations.

Respondent

Honorable Joseph R. Kainrad, Judge, Portage County Ohio Court of Common Pleas.

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JURISDICTION

The Sixth Circuit Court of Appeals' Order was entered October 26, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); and the timeliness of Petitioner's filing is governed by Supreme Court Rule 13.1.

The Application for Writ of Habeas Corpus that is the subject of this Petition is not a "second or successive habeas corpus application" within the meaning of 28 U.S.C. § 2244(b). Therefore, 29 U.S.C. § 2244(b)(3)(E) does not affect the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b) states:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the claim relies on a new rule of constitutional

law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

28 U.S.C. § 2254(a) through (d) states:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective

process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In May 1996, Petitioner, Christopher G. Harrison, stood trial in Ohio state court for Involuntary Manslaughter arising out of a head-on traffic collision resulting in the death of the other motorist. There, the issue of singular significance was whether it was Petitioner or the other motorist who crossed the centerline to cause the collision. At the close of evidence, Respondent, Hon. Joseph R. Kainrad charged the jury on the Involuntary Manslaughter offense, i.e., causing the death of another as a proximate result of committing a misdemeanor or a minor misdemeanor; and on its predicate offenses, "Marked Lanes" and "DUI."

During deliberations, the jury inquired of Respondent as to whether it could find Petitioner "guilty of DUI, but innocent of manslaughter." Respondent answered "No;" and the jury later returned a "guilty" verdict on the Involuntary Manslaughter charge. In September 1996, Respondent sentenced Petitioner to an indefinite term of imprisonment and revoked his driver's license. Petitioner would unsuccessfully appeal his conviction to the intermediate appellate state court and, ultimately, to the Ohio Supreme Court.

In the meantime, Petitioner sought release on bail pending disposition of his appeals. To no avail, he exhausted direct and collateral relief under state law. Then, in January 1997, he petitioned the U.S. District Court (ND Ohio ED) for release via 28 U.S.C. § 2254, the federal habeas corpus statute. The petition was summarily dismissed on procedural

grounds. However, since Petitioner had by then obtained an early "shock probation" release in the state trial court, no further appeal or other action was taken. His driver's license remained revoked for life, however, and he remains on Respondent's probation.

In January 1999, the U.S. Court of Appeals for the Sixth Circuit announced *Herrington v. Edwards*, granting that petitioner federal habeas corpus relief on grounds that his trial court's refusal to permit the jury to find and return perceived inconsistent verdicts violated his rights to a trial by jury and to a fundamentally-fair trial under the U.S. Constitution's Fifth, Sixth and Fourteenth Amendments. On hearing of *Herrington*, Petitioner returned to the state courts for habeas corpus relief on the "merits" of his conviction, again without success.

In October 1999, Petitioner then returned to federal court with the instant Application for Writ of Habeas Corpus, seeking vacation of his sentence and unconditional release under *Herrington* facts and ratio decidendi. However, considering the Application as a "second or successive habeas corpus application" under 28 U.S.C. § 2244(b), the district court transferred it to the Sixth Circuit Court of Appeals for leave to proceed under 28 U.S.C. § 2254. Per Order entered 10/26/00, the Court of Appeals denied that leave without discussion.

On certiorari, Petitioner seeks this Court's plenary review of such transfer and disposition of his Application.

ARGUMENT

The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.

At fn. [1e] on 857 in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 140 L.Ed.2d 849 (1998), this Court posed the very issue presented by this Petition for Certiorari:

> This case does not present the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application. Therefore, we have no occasion to decide whether such a filing would be a second or 'successive habeas corpus application' within the meaning of AEDPA."

Here, Petitioner raises his *Herrington*[1] claim for the first time in a 28 U.S.C. § 2254 habeas petition after the federal district court rejected his initial petition and no appeal was therefrom taken.

Within the lineage of *McClesky v. Zant*, 499 U.S. 467, 113 L. Ed.2d 517 (1991), however, Petitioner has not "abused the writ" of habeas corpus. His 1997 Application was designed only to obtain release on bail pending direct review of his state court conviction, not to attack the constitutional merit of that conviction. It was only after *Herrington* was decided in 1/99 that Petitioner realized his conviction's

---

[1] *Herrington v. Edwards*, 6th Cir. Ct. App. Unreported Case No. 97-3542 (1/99). App. F at 17a.

constitutional infirmity and returned to habeas corpus for complete relief. As such, Petitioner cannot be said to have either "deliberately abandoned," "inexcusably neglected" or "procedurally defaulted" his *Herrington* claim in that initial application.

Nor does the 4/24/96 Enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), with its 28 U.S.C. § 2244(b)'s tighter restrictions on federal court review of "second or successive habeas corpus applications," codify Petitioner's abuse of the writ. Akin to the "unexhausted state remedy" and "premature claim" habeas corpus petitioners who return to federal court, respectively "exhausted" and "ripe," this "unrelated claim" Petitioner returns with his "merits" petition that, yet to receive a single adjudication, is simply not a "second or successive" habeas corpus application within AEDPA's ambit. As this Court observed in *Stewart*, *supra* at L. Ed.2d 857:

> To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

Accordingly, this case provides opportunity to finalize interpretation of the "second or successive" application under AEDPA, an important question of federal law.

CONCLUSION

For this reason, the Court should grant certiorari.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 26, 2000]

No. 00-3641

CHRISTOPHER G. HARRISON,)
Movant.)
)

ORDER

Before: KENNEDY, SUHRHEINRICH, and MOORE,
Circuit Judges

Christopher G. Harrison moves this court for an order authorizing the district court to consider a second or successive petition for habeas corpus relief under 28 U.S.C. § 2254. See 28 U.S.C. § 2244. Upon consideration, the motion is **DENIED.**

ENTERED BY THE ORDER OF THE COURT

/s/_____
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed February 29, 2000]

No. 4:99CV2537

CHRISTOPHER G. HARRISON, *PETITIONER*,	)
v.	)
JOSEPH R. KAINRAD, *RESPONDENT*.	)

JUDGE PETER C. ECONOMUS

MEMORANDUM OPINION AND ORDER

On October 20, 1999, Petitioner, Christopher G. Harrison, filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254. On October 28, 1999, the case *sub judice* was referred to Magistrate Judge Patricia A. Henmann for preparation of a report and recommendation pursuant to 28 U.S.C. § 636 and LR 72.1. On November 16, 1999, the

prior referral was rescinded and this action was referred to Magistrate Judge George J. Limbert. On December 28, 1999 Respondent filed a motion for an Order transferring this matter to the Sixth Circuit (Dkt. #15).

On February 8, 2000, the Magistrate Judge recommended that Respondent's motion to transfer this matter to the Court of Appeals, Sixth Circuit for a determination by the court as to whether the petitioner may proceed should be granted (Dkt. #18). On February 24, 2000, Petitioner filed his objections (Dkt. #19).

The Court was reviewed the report and recommendation of the Magistrate Judge, *de novo*. The Court finds that the report and recommendation (Dkt. #18) is well-supported and that Petitioner's objections are without merit. Therefore, Magistrate Judge Limbert's report and recommendation is hereby **ADOPTED** and Petitioner's objections are overruled.

Accordingly, Respondent's motion (Dkt. #15) is **GRANTED.**

IT IS SO ORDERED.

/s/_____
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed February 8, 2000]

No. 4:99CV2537

UNITED STATES, ex rel.)
CHRISTOPHER G.)
HARRISON,)
401 Greenbriar Drive)
Cortland, Ohio 44410)
Applicant,)
)
v.)
)
HON. JOSEPH R.)
KAINRAD, JUDGE)
Portage County Court of)
Common Pleas)
203 West Main Street)
P.O. Box 1035)
Ravenna, Ohio 44266-1035)
Respondent.)

JUDGE PETER C. ECONOMUS
MAGISTRATE JUDGE GEORGE J. LIMBERT

REPORT AND RECOMMENDATION

Respondent now moves this Court to transfer this action to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244. Applicant has filed a Memorandum Contra Respondent's Motion to Transfer, arguing that transfer is not required since his current application is not a "second or successive habeas corpus application" under § 2244.

The instant petition was filed subsequent to April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), so the AEDPA applies herein. *See Lopez v. Douglas*, 141 F.3d 974, 975-976 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 556 (1998). The relevant law provides that, "before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3)(A). When a second or successive petition is improperly filed in the District Court, the petition should be transferred to the Sixth Circuit pursuant to 28 U.S.C. § 1631 and treated as an application filed under 28 U.S.C. § 2244. *See In re Sims*, 111 F.3d 45 (6th Cir. 1997).

Here, Applicant argues that his first habeas corpus petition, which sought his release on bail pending appeal, was dismissed summarily for its failure to exhaust state court remedies. When a initial petition is dismissed without prejudice for failure to exhaust state court remedies, the subsequent petition does not qualify as a second or successive

petition that requires an order from the Court of Appeals authorizing its filing in this Court for consideration. *See In re Wilson*, 142 F.3d 939, 940 (6th Cir. 1998). Contrary to Applicant's argument, his first petition was dismissed summarily upon its merits. The Court ruled that since there is no constitutional right to post-conviction bail, its denial to Applicant did not rise to a level of deprivation of fundamental fairness. *See* Report and Recommendation (adopted by this Court), Docket #4, at 6.

Because Applicant's first habeas corpus was decided on the merits, the current application qualifies as a "second or successive application" under 28 U.S.C. § 2244. Since this is a second or successive petition which is improperly filed in this Court, it is recommended that this Court grant Respondent's Motion to Transfer this matter to the Sixth Circuit for a determination by that court a to whether the Applicant may proceed on his petition. *See In re Sims*, 111 F.3d at 47.

/s/_____
GEORGE J. LIMBERT
U.S. MAGISTRATE JUDGE

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

[Filed May 19, 1997]

No. 5:97cv0008

CHRISTOPHER G. HARRISON, *PETITIONER*,	)
v.	)
REGINALD WILKINSON DIRECTOR *RESPONDENT*	)

JUDGE PETER C. ECONOMUS

JUDGMENT

Plaintiff filed a Petition for a Writ of Habeas Corpus pursuant to, 28 U.S.C. § 2254 (Dkt. #1). The matter was referred to Magistrate Judge James S. Gallas for a Report and Recommendation. The Report and Recommendation was filed with the Court on April 11, 1997 and no objections were filed.

Magistrate Judge Galls recommended that the petition be dismissed as Petitioner has not demonstrated that he is in custody pursuant to judgment of state court which was the result of a decision that was contrary to or involved the unreasonable application of federal law as determined by the Supreme Court of the United States, or was the result of a decision based on an unreasonable determination of the facts in light of the evidence in the state court proceeding. *See* 28 U.S.C. § 2254(d)(1) and (2).

Upon a *de novo* review, the Court finds that there is substantial evidence to support the Magistrate Judge's decision. Therefore, the Magistrate Judge's Report and Recommendation (Dkt. #4) is **ADOPTED. JUDGMENT** is hereby granted in favor of the Respondent.

IT IS SO ORDERED.

/s/_____
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed April 11, 1997]

No. 5:97 CV 0008

CHRISTOPHER G. HARRISON,
Petitioner,

v.

REGINALD WILKINSON, DIRECTOR,
Respondent.

Judge Peter C. Economus
Magistrate Judge James S. Gallas

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Petitioner, Christopher G. Harrison, is a prisoner in state custody seeking federal habeas corpus review under 28 U.S. C. § 2254 to overturn the decisions in the state courts

denying his release on bail pending appeal. For the reasons that follow, summary dismissal of the petition without requiring respondent to answer is recommended.

On May 20, 1996 Harrison was convicted in the Common Pleas Court of Portage County, Ohio for involuntary manslaughter in violation of Ohio Rev. Code § 2903.04(B). According to Harrison, he was sentenced to an indefinite term of confinement from three to ten years. Harrison subsequently commenced a direct appeal of his conviction to the 11th District Court of Appeals, and no decision has yet been issued as of this date.

On September 17, 1996 Harrison filed with the state appellate court an application for release on bail and suspension of the trial court's sentencing order. *See Exhibit to Petition, State v. Harrison*, Case No. 96-P-0240. The state objected to Harrison's motion, and the motion was promptly denied. Harrison remained in custody at the Trumbull Correctional Institute.

The petition further relates that following the adverse decision by the state appellate court, Harrison filed a verified petition for state writ of habeas corpus in the Trumbull County Court of Common Pleas, alleging illegal restraint of liberty based on the same grounds as presented to the state appellate court. These grounds were that this is not a capital case and that Harrison posed no risk of flight or danger to the community. The application was denied on December 23, 1996. In his petition brief Harrison relates that the Trumbull County Court of Common Pleas dismissed his petition for writ of habeas corpus holding that granting the petition would

conflict with the Eleventh District Court of Appeals judgement denying him bail pending appeal.

On January 3, 1997 Harrison filed his petition for a federal writ of habeas corpus under 28 U.S.C. § 2254. By supplemental notice (Docket No. 3) Harrison submitted the February 26, 1997 decision from the Supreme Court of Ohio denying his petition for state writ of habeas corpus. The decision of the Supreme Court of Ohio states that the petition for writ of habeas corpus was considered in the manner prescribed by law and denied. It is noteworthy that the denial was not based on the failure to show violation of substantial constitutional rights. Morever, nowhere in the federal petition for habeas corpus does Harrison state that he raised violation of constitutional rights as an issue to either the state appellate court, or in the state habeas corpus proceedings.

In federal court, though, Harrison is requesting that bail be granted on the sole ground that he is in custody in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Harrison has briefed this issue, however, his brief contains no reference to these particular constitutional issues except in the vaguest of terms that federal judicial intervention is necessary "to protect his federal constitutional rights." In his brief Harrison maintains that he was denied due process of law in the state court proceeding because the state courts did not address the risk of flight and danger to the community bail considerations as required "*under state law.*" Harrison also relies primarily on the decision in *State ex rel. Priman v. Money*, 69 Ohio St.3d 591, 635 N.E.2d 26 (1994) where the Supreme Court of Ohio overruled two of its prior decisions to "hold that habeas corpus is the proper vehicle to challenge excessive bail or

refusal to set bail *after a judgment of conviction*" (emphasis supplied). *Id.*, at 594.

At first it appears that Harrison's reliance on *State ex rel. Pirman v. Money*, is somewhat misplaced because that case notes

> Moreover, since there is no constitutional right to post-conviction bail, the right to such bail exists by virtue of R.C. 2953.09, App. R. 8 and Crim R. 46.

Id., at 594.

This simply restates the general principal that a state prisoner has no constitutional right to bail after conviction and pending appeal, and denial of post-conviction bail is not a basis for federal habeas corpus relief. *Bloss v. Michigan*, 421 F.2d 903, 905 (6th Cir. 1970); *Sellers v. Georgia*, 374 F.2d 84, 85 (5th Cir. 1967); *Hamilton v. New Mexico*, 479 F.2d 343, 344 (10th Cir. 1973); *United States ex rel. Fink v. Heyd*, 408 F.2d 7 (5th Cir. 1969), *cert. denied*, 396 U.S. 895, 90 S.Ct. 192, 24 L.Ed.2d 172 (1969); *State ex rel. Silcott v. Spahr*, 50 Ohio St.3d 110, 111, 522 N.E.2d 926 (1990). Harrison, though, has alleged a violation of the Eighth and Fourteenth Amendments as his basis for habeas corpus. Although Harrison has not argued the constitutional implication of these amendments, there is a solitary exception to the general principle, which is, that once a state makes provisions for bail pending appeal, the Eighth and Fourteenth Amendments require that it not be denied arbitrarily or unreasonably. *Finetti v. Harris*, 609 F.2d 594, 599 (2nd Cir. 1979); *Brown v. Wilmont*, 572 F.2d 404 (2nd Cir. 1978);

Young v. Hubbard, 673 F.2d 132, 134 (5th Cir. 1982); *Pulaski v. Hopkins*, 745 F.Supp. 882, 884 (E.D.N.Y. 1990); *Owens v. Beard*, 829 F.Supp. 736, 739 (M.D. Pa. 1993); *Lewis v. Maine*, 736 F.Supp. 13, 14 (D. Me. 1990); and see *State ex rel. Silcott v. Spahr*, 50 Ohio St.3d at 111.

The Ohio Supreme Court has acknowledged that "[t]he right to bail on appeal exists through R.C. 2953.09, App. R. 8, and Crim R. 46." *Dapice v. Stickrath*, 40 Ohio St.3d 298, 300, 533 N.E.2d 339 (1988); *State ex rel. Pirman v. Money*, 69 Ohio St.3d at 594 (overruling *Dapice* on other grounds). Ohio has made provision for bail and suspension of sentence pending appeal which appear in Ohio Revised Code Chapters 2949 and 2953.

The problem confronting Harrison's petition, though, is that Harrison has not shown that his federal constitutional arguments were explicitly raised in the state court proceedings. The federal court does not act as an additional appellate court to review state law and procedure. *Oviedo v. Jago*, 809 F.2d 326, 328 (6th Cir. 1987). Federal habeas corpus review serves only to reverse convictions when there has been a constitutional error or an error in state law so egregious so as to deny fundamental fairness in the trial process. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Clemmons v. Sowders*, 34 F.3d 352, 356 (6th Cir. 1994).

This requires the petitioner to present the "substance of the federal claim to the state's highest court." *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). Federal review is limited to only those issues which were "fairly presented" to the state's highest court. *Anderson*

v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984); *Tuggle v. Seabold*, 806 F.2d 87, 91 (6th Cir. 1986). It is essential that the state court be alerted to the fact that the petitioner is asserting claims under the United States Constitution. *Duncan v. Henry*, 513 U.S. -, 115 S.Ct. 887, 888, 130 L.Ed.2d 865, 868 (1995). "If a habeas petitioner wishes to claim that [a] ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Id.*; *Riggins v. McGinnis*, 50 F.3d 492, 494 (7th Cir. 1995), cert denied 155 S.Ct. 2621, 132 L.Ed. 862 (1995). It is not necessary for the state court to have actually addressed the merits of the federal claim, so long as the claim has been "fairly presented" to the state's highest court. *Meeks v. Bergen*, 749 F.2d 322, 325 n. 1 (6th Cir. 1984).

Harrison's argument is that his conviction was not a capital case, and he poses no risk of flight nor danger to his community. Harrison did not argue his present grounds to the Ohio Supreme Court based on the Eighth and Fourteenth Amendments, which require that bail not be denied arbitrarily or unreasonably. Harrison's "illegal restraint of liberty" ground raised in the state courts is clearly not the equivalent to the specific constitutional issue which must be raised in order to except his case from a general constitutional principle that there is no right to post-conviction bail. The argument addressed here in this report concerning the arbitrary denial of bail was an absolute requirement which had to have been raised to the Ohio Supreme Court. Since his constitutionally based argument was presented only for the first time on federal habeas corpus review, and hence not "fairly presented" to the state's highest court, Harrison is now left

with federal review only upon errors which rise to a level of deprivation of fundamental fairness in the trial process. *Estelle v. McGuire*, 502 U.S. at 67-68; *Matlock v. Rose*, 731 F.2d 1236, 1242 (6th Cir. 1984); *cert. denied*, 470 U.S. 1050 (1985); *Serra v. Michigan Dept. of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993), *cert. denied*, 510 U.S. 1201 (1994). Since there is no constitutional entitlement to post-conviction bail, its denial did not rise to a level of deprivation of fundamental fairness. Consequently, the petition must be dismissed.

CONCLUSION AND RECOMMENDATION

Following review of the petition and applicable law, Harrison has not demonstrated that he is in custody pursuant to judgment of a State court which was the result of a decision that was contrary to or involved the unreasonable application of Federal law as determined by the Supreme Court of the United States, or was the result of a decision based on an unreasonable determination of the facts in light of the evidence in the State court proceeding. *See* 28 U.S.C. § 2254(d)(1) and (2). Further, Harrison has not demonstrated that a reasonable fact-finder would not have found him guilty of the underlying offense. There has been no demonstrated need for an evidentiary hearing. It is therefore recommended that the petitioner's application for habeas corpus be summarily dismissed.

/s/_____
James S. Gallas
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See, United States v. Walters*, 638 F.2d 9047 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Not Recommended for Full-Text Publication]

No. 97-3542

MICHAEL HERRINGTON,)
Petitioner-Appellant,)
)
v.)
)
RON EDWARDS, Warden,)
Respondent-Appellee.)
)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: SUHRHEINRICH, CLAY, and GILMAN, Circuit Judges.

PER CURIAM. Petitioner, Michael Herrington, appeals from the judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We affirm the decision finding the exclusion of evidence was not a violation of due process. But, we hold that the error in jury instructions

was prejudicial. Therefore, the judgment of the district court denying the writ of habeas corpus is REVERSED and we grant a conditional writ of habeas corpus, which shall become unconditional if the State of Ohio fails to commence trial proceedings against Herrington within 180 days of this opinion.

I.

From the trial record, the Ohio Court of Appeals found the following facts: On February 27, 1981, at about 7:30 p.m., Michael Herrington and Michael Howell were drinking and at a residence in Dayton when they decided to commit a robbery. Upon leaving the house, they met Jim Terry and asked him if they could use his gun. Terry gave them his gun. Herrington and Howell proceeded to the Fireside Lounge in Dayton, Ohio.

Upon arrival, Herrington left the vehicle with the gun and robbed someone nearby while Howell remained in the car. Then, they went to another bar and had a few beers. Later, they proceeded to the Aztec Bar where they parked in the lot of the neighboring bowling alley. Meanwhile, Raymond Walton and Geraldine Rogers had pulled off the interstate highway to use the restroom. Rogers went inside the Aztec while Walton waited outside. Howell and Walton began talking. Herrington approached with the gun and ordered them into Walton's car. Walton drove for some distance. Herrington began beating Walton with his gun and told Howell to get Walton's money. Walton lost control of the car and crashed into a tree. Neighbors came out of their houses and saw the three men struggling inside the car. Herrington fired one shot during the struggle after which Howell grabbed

the gun. Both left the automobile and ran, later splitting the fifty dollars taken from Walton. Walton was taken to the hospital and died from the gunshot wound that had lacerated his heart. In June 1981, Herrington was located after being arrested in connection with a traffic violation. He admitted being in Dayton on the day of Walton's murder but denied being involved in criminal activity with Howell on that date. He also denied any knowledge of the robbery or shooting. At trial, Herrington claimed he did not remember where he was on that night. J.A. at 213-14.

On December 18, 1981, Herrington was found guilty of aggravated murder in violation of Ohio Revised Code § 2903.01(B) and aggravated robbery in violation of Ohio Revised Code § 2911.01(A)(1). J.A. at 171. At sentencing, the court "merged" the aggravated robbery with the murder charge. Essentially, the court dismissed the aggravated robbery charge. Herrington was sentenced to a term of life imprisonment. The court of appeals affirmed the common pleas court's judgment on March 21, 1983. J.A. at 213. He then applied for leave to appeal with the Ohio Supreme Court. J.A. at 224. On June 22, 1983, the Ohio Supreme Court denied Herrington's motion for lack of a substantial constitutional issue. J.A. at 271. He then filed for a writ of habeas corpus in federal district court which was rejected on April 15, 1997. J.A. at 335, 341. On December 11, 1997, the district court granted Herrington's request for a certificate of appealability. J.A. at 355. It certified two issues for appeal. The first issue is whether the exclusion of evidence indicating that Herrington was not the "triggerman" violated his right to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The second is whether Herrington was denied his constitutional rights to

trial by jury and to a fundamentally fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when the trial judge instructed the jury that it must return a verdict of either guilty on both counts listed in the indictment or not guilty on both counts.

II.

Dayton Police Sergeant James Hamby spoke with the shooting victim, Raymond Walton, in the Grandview Hospital emergency room as the victim was being prepared for surgery. The victim did not survive. According to Herrington, Hamby's testimony would have permitted a jury to infer that Howell, not Herrington, was the gunman. Herrington sought its admission on three bases: 1) as a present sense impression; 2) as an excited utterance; and 3) because the due process clause required its admission. J.A. at 219-220. According to the state court of appeals, the trial court found that "the conversation was hearsay and was too far removed from the scene of the crime in terms of time, distance, and circumstances to warrant the use of the impression exception, and the court noted further that the lapse of time and other pertinent factors, including the mental and physical condition of the decedent, precluded the admission of the conversation as an excited utterance." J.A. at 220. We agree. However, it is not the province of a federal habeas court to re-examine state court determinations on state law questions. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir.1995). Thus, the remaining question is whether the exclusion violated Herrington's constitutional rights.

The United States Constitution provides that all criminal defendants are entitled "to have compulsory process for obtaining witnesses in their favor," *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), and "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). But, the accused does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

Here, the exclusion at issue did not violate due process. As the trial court found, due process rights are sufficiently protected by the enumerated exceptions to the hearsay rule. J.A. at 220. Furthermore, the defendant does not have the right to introduce everything in his defense. His evidence as well as the state's must be reliable. In *Turpin v. Kassulke*, 26 F.3d 1392 (6th Cir.1994), this court determined that a statement that "was of dubious exculpatory value and bore considerable indicia of unreliability" could constitutionally be excluded. *Id.* at 1397.

As previously discussed, the facts surrounding the statement to Hamby illustrate its unreliability. The statement at issue in this case is hearsay, it is not corroborated, it admittedly cannot be corroborated with other evidence, the declarant was unavailable for cross-examination, and Hamby did not ascertain several characteristics of the victim's attacker or the quality of his identification. Although its exculpatory value might seem high, it is so highly unreliable as to make its exclusion proper.

III.

A.

The judge accurately instructed the jury on the elements of both counts, J.A. at 433-34--aggravated murder,[1] J.A. at 437, and aggravated robbery,[2] J.A. at 436. The jury

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[1] 2911.01 AGGRAVATED ROBBERY

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it. (2) Have a dangerous ordnance on or about the offender's person or under the offender's control.

(3) Inflict, or attempt to inflict, serious physical harm on another.

. . .

O.R.C. §2911.01.

[2] 2903.01 AGGRAVATED MURDER

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

instructions also included all of the typical admonitions of impartiality, presumption of innocence, and burdens of proof. The jury retired to deliberate at 3:30 p.m.

At approximately 4:50 p.m. that same day, the jury submitted a question to the court: "Can we members of the jury vote guilty on one count and not guilty on the other count?" J.A. at 444. The court responded:

> I think in many cases where there is more than one count this is impossible. In this case where the facts are so entertwined it would be impossible for you to find him guilty on one count and not guilty on the other.

J.A. at 444. Herrington's attorney, James Todd, objected that there was no requirement of consistent verdicts. He argued that the jury might find Herrington guilty of the robbery but find that he neither shot nor had anything to do with Walton's death; or perhaps it would find that the prosecution had not established that it was purposeful. J.A. at 445. The court overruled the objection. The court reasoned that "there's no way in the world, with concert of the actions of the two . . . that he could be found guilty of aggravated robbery and not guilty of aggravated murder. It may be that the jury's verdict

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. . .

(D) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.
O.R.C. § 2903.01.

will be not guilty on both counts. I have no idea." J.A. at 445. The jury returned with a guilty verdict on both counts.

B.

The Sixth Amendment to the Constitution guarantees a defendant the opportunity to have a jury decide guilt or innocence. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *In re Winship*, 397 U.S. 358 (1970), *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). The court must not dictate the outcome. If it does so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause. Although here the underlying instructions are accurate and did not violate the Sixth Amendment, the answer to the jury's question was the last word on the elements heard from the court. Thus, if sufficiently prejudicial, the impact of an inaccurate instruction will not be cured by a proper underlying charge.

The trial court's answer to the jury's question was clearly error. First, both Ohio and federal law entitle a jury to find inconsistent verdicts. *United States v. Powell*, 469 U.S. 57, 65 (1984)(holding that the rendering of inconsistent verdicts, even those that acquit on a predicate offense while convicting on the compound offense, will not establish insufficiency of evidence); *United States v. Miller*, 161 F.3d 977, 1998 WL 801349 (6th Cir. (Mich.) 1998)("'[a] jury is free to render inconsistent verdicts or to employ relevant evidence in convicting on one count that it may seem to have rejected in acquitting on other counts.'"); *State v. Adams*, 374 N.E.2d 137 (1978)("'A verdict responding to a

designated count will be construed in light of the count designated, and no other.'").

Second, logic and consistency do not necessitate drawing the inferences used by the trial court and subsequent courts. The district court reasoned that the evidence established guilt, outlining the proof of guilt – Howell's testimony, Herrington's denial on the stand coupled with the lack of an alibi, and testimony of Howell's wife and her brother who overheard some of Herrington's comments. J.A. at 324. The district court also assumed that the jury's question indicated that the jury must have been ready to convict on one of the crimes. The court further concluded that the jury had already decided Herrington was on the scene, that it disbelieved his defense, and that if it was thinking of convicting Herrington of only one crime, it must have been aggravated murder. J.A. at 334-35. The district court based this conclusion on the fact that there was some confusion in the record as to whether Herrington took the money from the victim's person, an element of the aggravated robbery charge. J.A. at 335. This confusion, the court opined, was the most logical reason for choosing to convict on only one count even after deciding to place Herrington at the scene.

But, both the statute and the underlying instruction support the conclusion that the jury was required to find all of the elements of aggravated robbery in order to find aggravated murder. As such, if the jury did not believe an aggravated robbery had occurred, it could not find all of the elements to convict on the aggravated murder charge. Thus, it would be at least as reasonable to conclude that the jury's question indicated that it had found guilt only on the aggravated robbery count.

Finally, we must consider whether Herrington's defense made the trial court's answer proper. Herrington's only defense – that he was not at the scene on the night of the incident – if believed would entitle him to an acquittal on both charges. If disbelieved, Herrington put forth no further arguments relating to his innocence. Thus, the State, like the district court, argues that this required the jury, if it disbelieved Herrington's statement, to find him guilty on both counts.

If this were a high school debating match, perhaps that would be true. However, because the State bears the burden of proving their case beyond a reasonable doubt, a defendant may be entitled to an acquittal even if his lawyer asks no questions on cross-examination and presents no case or argument of his own. Here, the jury could disbelieve Herrington's statement about his whereabouts, but still find that the State presented insufficient evidence to establish the elements of one of the counts beyond a reasonable doubt. After all, just as it could disbelieve Herrington, it could disbelieve Howell and his family members – all persons the jury might reasonably find biased. Thus, the state and district court's explanation for the accuracy of the trial court's answer to the jury is unconvincing.

Nonetheless, the State argues that Herrington placed himself in this situation by making presence at the scene the only relevant issue for the jury to decide. Indeed, James Todd, Herrington's trial counsel, explained in his closing statement that identity was the only defense:

> Remember, during opening statement I got up here and told you that we admit everything

> except one thing? There is one element of these offenses which myself and Michael Herrington are contesting in this case, and it is an element which the State of Ohio must prove beyond a reasonable doubt. That is identity. Was Michael Herrington there? And did Michael Herrington, with the requisite degree of what we call culpability, did he mean to participate in a robbery and murder, and did he, in fact, do so? That's it. That's all you've got to decide in this case.

J.A. at 431. Todd later made similar statements that "we admitted" the rest of the issues. J.A. at 432. But he also described the remaining issue of identity as whether Herrington "knowingly, purposefully participate[d] in the robbery and the killing" of Walton, implicitly indicating that other elements might be in question. J.A. at 432. Furthermore, Todd spent the end of his closing argument attempting to discredit the trustworthiness and reliability of the prosecution witnesses' testimony, including that which went to elements other than Herrington's presence at the scene. State Court Trial Trans. at 357-69.

Although some of Todd's statements suggest that he admitted everything except the issue of Herrington's presence at the scene, we find that no such stipulation occurred. Neither Todd nor Herrington ever stipulated formally to the elements. Moreover, none of the parties acted as though such a stipulation was made. First, the totality of Todd's statements indicates that the defense was not merely asking the jury to determine whether Herrington was present at the crime, but rather was asking it to determine whether the prosecution had

established all elements beyond a reasonable doubt. Todd's own statements explained that additional questions must be decided when he stated that proof of culpability and commission were required. Second, Todd argued that the prosecution witnesses were not trustworthy. The jury could have concurred in that assessment, in whole or in part, in a manner that might have made it possible to convict on only one of the two available counts. Third, Todd objected to the judge's answer to the jury's question, again indicating that he did not believe he had stipulated to the jury deciding only the issue of presence. Finally, and perhaps most importantly, the judge himself initially instructed the jury on every element of the crimes. There is no indication in the initial jury instruction that indicates that the judge believed the jury's purpose was to decide only whether it believed Herrington's defense. Given that no stipulation occurred, the judge's statement was inaccurate as a matter of law. Consistent verdicts are neither legally nor logically mandated here. The jury was required to find an additional element - purposely causing the death of another - to convict on the aggravated murder charge. The judge himself explained this additional element in the underlying charge when he stated that a person "acts purposely when it is his specific intention to cause a certain result." J.A. at 436. It is not merely felony murder. To convict under O.R.C. § 2903.01, the jury must find either a specific intent to kill or at least find that the aggravated robbery and its manner of commission would be likely to cause death so that the intent might be inferred. *State v. Garner*, 656 N.E.2d 623, 634 (Ohio 1995). Thus, proof beyond a reasonable doubt that Herrington was present during a killing that occurred during a robbery would be insufficient to sustain a guilty verdict for aggravated murder. As a result, a conclusion that the jury had made all the requisite findings

to convict on both charges could not follow from a conclusion that the jury's question indicated it was ready to convict on one charge. If the jury found all of the elements of aggravated murder, it would have been required to find all of the elements of the lesser included aggravated robbery (because an element of aggravated murder is aggravated robbery).[3] If the jury found all the elements of aggravated robbery, however, consistency would not require that it find aggravated murder. The "aggravation" in the robbery charge was the use of a deadly weapon, not the commission of a murder.

C.

The district court concluded that this error was harmless. J.A. at 320. For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures shall be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); accord *California v. Roy*, 117 S.Ct. 337, 339 (1996) (per curiam); *Gravley v. Mills*, 87 F.3d 779, 789 (6th Cir.1996); *Wright v. Dallman*, 999 F.2d 174, 180 (6th Cir.1993); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir.1993). If the judge is sure that the error had no or very slight effect or influence, the verdict and judgment must stand. *O'Neal v. McAninch*, 513 U.S. 432, 436-38 (1995)(quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)). However, if the judge has grave doubt as to whether a unconstitutional

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[3] Note, the jury was not instructed on lesser included offenses.

trial error had substantial and injurious effect or influence in determining the jury's verdict, the judge must treat the error as if it did and grant the habeas writ. *Id.*, accord *Gravley*, 87 F.3d at 789; *Houston*, 50 F.3d at 386 n.1.

To warrant habeas relief because of incorrect jury instructions, a petitioner must show that the instructions, as a whole, were so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir.1986); *Thomas v. Arn*, 704 F.2d 865, 868-69 (6th Cir.1983); *see also United States v. Sheffey*, 57 F.3d 1419, 1429-30 (6th Cir.1995) (standard of review for jury instructions challenged on direct criminal appeal).

Despite this liberal standard of review, a jury instruction will not withstand scrutiny if it submits alternative theories for the jury to convict and the reviewing court cannot determine whether the jury relied on the unconstitutional instruction. *Zant v. Stephens*, 462 U.S. 862, 881-83 (1983); *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970); *United States v. Palazzolo*, 71 F.3d 1233, 1235-38 (6th Cir.1995); *United States v. Wilkinson*, 26 F.3d 623, 625 (6th Cir.1994). If an instruction is ambiguous and not necessarily erroneous, it can run afoul of the Constitution only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle*, 502 U.S. at 72 & 73 n.4; *Boyde v. California*, 494 U .S. 370, 380 (1990).

Contrary to much of the district court's analysis, the review should not be based on the sufficiency of the evidence,

but instead on the effect of the error on the jury. *See Kotteakos v. United States*, 328 U.S. 750, 755, 763- 65, 767, 775-76 (1946)(reversal despite guilt that was overwhelmingly manifest).

In *Sullivan*, the Supreme Court explained that some errors are structural defects and defy harmless error review because such errors are per se harmful. *Sullivan*, 508 U.S. at 281 (holding that an instruction to the jury telling it to presume certain facts was structural error). The Court stated that, "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable upon appeal; it requires an actual jury finding of guilty." *Id.* at 280. At the same time, this court does not agree that Sullivan makes all Sixth Amendment violations structural defects and instead requires that the error in the instruction rise to the same level as removing a factual determination from the jury. *See id.* at 280-81 (explaining the extraordinary gravity of the error at issue in that case). Because the facts in this case do not rise to the level of a structural error, they are not per se unconstitutional. Therefore, this court must determine whether the error was harmless before determining the disposition of the writ.

We find that this error was not harmless. We can never know what was in the minds of the jurors; but the answer to their question was error, it modified the prior instructions, and absent the instruction it might have convicted only on the robbery charge. As such, it could have had a substantial and injurious effect on the jury's independence and a substantial and injurious effect on the jury's interpretation of the initial, correct instructions. Thus, this court has grave

doubt whether the instruction had substantial and injurious effect or influence in determining the jury's verdict, *O'Neal*, 513 U.S. at 436, even when viewing the judge's statements within the totality of the instructions. Thus, we are required to treat the error as if it was prejudicial and grant the writ of habeas corpus. *Id.*

IV.

For the forgoing reasons, this panel holds that the proffered testimony at issue was properly excluded and we **AFFIRM** that evidentiary ruling. However, we also hold that the answer to the jury's question made the jury instructions unconstitutionally prejudicial. Thus, we **REVERSE** the district court and grant a conditional writ of habeas corpus. This conditional writ shall become unconditional and permanent unless the State of Ohio commences trial proceedings against Mr. Herrington within 180 days of this opinion.